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No. 95-1417

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DEBORAH W. KANE and ANDREW KANE,

Petitioners,

v.

MAGNA MIXER COMPANY and PAUL L. KRAMER,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals correctly determine that the Petitioners' claim for contractual indemnity was waived when it was not brought as a compulsory counterclaim in the initial litigation between the parties which involved the same contract and the same contractual indemnity provision?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the United States District Court for the Northern District of Ohio granting the Defendants' Motion to Dismiss is unreported, but has been reproduced in the Appendix to the Petitioners' Petition for Writ of Certiorari. On December 7, 1995, the United States Court of Appeals affirmed the Order of the United States District Court for the Northern District of Ohio. The decision of the United States Court of Appeals for the Sixth Circuit is reported at 71 F.3d 555 (6th Cir. 1995).

COUNTER-STATEMENT OF THE CASE

This Court has held on prior occasions that the failure of a party to raise a compulsory counterclaim will forever bar that claim.[1] The Sixth Circuit Court of Appeals applied this well-established principle in holding that the failure of the Petitioners' assignee to assert any claim for contractual indemnity in the initial lawsuit between the parties resulted in a waiver of the claim. In this appeal, Petitioners seek to rewrite Rule 13(a) of the Federal Rules of Civil Procedure so as to provide them with a second opportunity to raise a claim which the Petitioners and their assignor neglected to raise in the first proceeding. Because the Petitioners' efforts at piecemeal litigation contravene the intent of the Federal Rules of Civil Procedure, and in light of the fact that the Sixth

[1] *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 468, 94 S.Ct. 2504, 2506 n. 1, 41 L.Ed.2d 243 (1974).

Circuit properly applied the waiver doctrine of Rule 13, Petitioners' request for certiorari should be denied.

The Respondents are cognizant of the Court's desire to constrain Petitions for Certiorari and Briefs in Opposition thereto to concise legal issues without the incorporation of extensive statements of the case. However, an analysis of the legal issues raised in Petitioners' Petition for Certiorari necessitate a somewhat broader review of the factual and procedural history of this case.

The protracted course of litigation which has culminated in this appeal has its origin in an industrial accident that occurred over seven (7) years ago. On September 22, 1988, Deborah W. Kane injured her right hand while operating a dough mixer that had been manufactured in 1948 by Triumph Manufacturing Company ("Triumph"). Initially, the Petitioners filed suit in the United States District Court for the Western District of Pennsylvania ("the Pennsylvania litigation") naming Magna as the sole Defendant[2]. Although it was undisputed that Magna did not manufacture, sell or service this piece of equipment, Petitioners argued that Magna had assumed liability for defects in equipment sold by Triumph by virtue of Magna's agreement to purchase certain limited assets from Triumph in 1984. In effect, by virtue of an Asset Purchase Agreement executed on December 28, 1984, it was Petitioners' contention that

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[2] Respondent, Magna Mixer Company, is a closely held corporation without parent companies, subsidiaries nor affiliates. This statement is made in accordance with Sup. Ct. R. 28.1.

Magna had assumed liability for defects in machinery that had been manufactured by Triumph over thirty-six (36) years prior to the execution of the Agreement.

The Agreement between Triumph and Magna contained cross-indemnification provisions. Pursuant to the terms of the contract, Triumph, as seller, had agreed to indemnify and assume responsibility for any losses relating to pre-closing activities, while Magna would be responsible for debts and obligations arising from activities occurring after the purchase. Because the Petitioners' claim related to a machine manufactured and sold in 1948 (an event arising prior to the purchase), Magna filed a Third-Party Complaint against Triumph which relied upon the indemnification language of the contract at Clause 12(A). Triumph filed no response to the Third-Party Complaint and did not assert any counterclaim against Magna. In fact, even after the Petitioners amended their Complaint to assert a direct claim for damages, Triumph never appeared or offered any defense to the claims raised against it in the Pennsylvania lawsuit. Ultimately, the result of Triumph's failure to defend the Pennsylvania lawsuit was the entry of default and the award of a money judgment to the Petitioners.

While Triumph was taking no action to defend the Pennsylvania lawsuit, Magna was proceeding to secure a judgment in its favor. In particular, the United States District Court for the Western District of Pennsylvania entered summary judgment in favor of Magna based on the Court's determination that Magna had no contractual or legal responsibility for any defects in machinery or

equipment that may have been manufactured by Triumph. The grant of summary judgment in favor of Magna in the Pennsylvania lawsuit was appealed to the United States Court of Appeals for the Third Circuit. Ironically, one of the issues raised by the Petitioners on appeal to the Third Circuit was that Magna had assumed contractual liability for Triumph's debt under the cross-indemnification provisions (particularly Clause 12(B)) of the Asset Purchase Agreement. In raising this issue, Petitioners relied upon the very same indemnification clause in the Agreement that formed the basis for Magna's Third-Party Complaint. These arguments were rejected by the Third Circuit, and the entry of summary judgment in favor of Magna was affirmed on November 14, 1991.

While the Petitioners had been awarded a substantial money judgment against Triumph, they were apparently unable to collect on their default judgment. As such, the Kanes obtained an assignment from Triumph and brought this action in the United States District Court for the Northern District of Ohio as Triumph's assignee seeking to assert a right of contractual indemnity. The Complaint sought a declaratory judgment that Triumph was entitled to indemnity from Magna under Paragraph 12(B) of the Asset Purchase Agreement. In effect, through the filing of this second lawsuit, the Petitioners sought to bring on behalf of Triumph a claim which Triumph possessed, yet failed to assert, during the course of the Pennsylvania lawsuit.

Magna moved to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure claiming that the doctrines of res judicata, collateral estoppel and waiver barred this second lawsuit. On referral for Report

and Recommendation, the Magistrate Judge recommended that the Motion be granted, concluding that Triumph's alleged right to indemnity from Magna was a claim that could and should have been raised in the prior action by both Triumph and the Petitioners, and thus was barred by res judicata. Focusing on the Kanes' status as Triumph's assignees, the Magistrate Judge stated that Triumph waived its indemnity claim by failing to assert it as a compulsory counterclaim under Fed. R. Civ. P. 13(a) and by failing to assert the claim in response to the Kanes' Amended Complaint. The Magistrate Judge further stated that the Kanes themselves had the opportunity to raise the Asset Purchase Agreement in their early attempt to impose successor liability against Magna. The Magistrate Judge noted that the Kanes relied on the indemnity agreement before the Third Circuit and stated that they were attempting to present the "same issue" in this case. The District Court adopted the Magistrate's Report and Recommendation holding that res judicata bars all claims that were brought or could have been brought in the first action.

On appeal to the Sixth Circuit, an Order was entered affirming the judgment of the District Court. While the Sixth Circuit rejected Magna's arguments that res judicata and collateral estoppel barred the second action, the Court found that Triumph's contractual indemnity claim was a compulsory counterclaim that should have been brought during the Pennsylvania lawsuit. The failure to do so resulted in a waiver and justified the dismissal of this action. A Petition seeking the issuance of a Writ of Certiorari followed the judgment of the Sixth Circuit. In this appeal, the Petitioners challenge the Sixth Circuit's

determination that Triumph's contractual claim was a compulsory counterclaim that should have been brought in the first lawsuit. In effect, what Petitioners seek through this appeal is to reward Triumph for its inaction in allowing the entry of default and its disregard of Rule 13, by permitting them to assert a claim that should have been brought as part of the Pennsylvania lawsuit. Since Triumph's claim for contractual indemnity under Clause 12(B) of the Asset Purchase Agreement was logically part of the same transaction that formed the basis for Magna's contractual indemnity claim under Clause 12(A) of the same contract, the Sixth Circuit properly determined that Triumph's claim was a compulsory counterclaim that had been waived.

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

The decision of the Sixth Circuit Court of Appeals does not conflict with the decisions of other circuits.

When a party is sued for breach of contract, does the compulsory nature of Rule 13(a) require the defendant to bring whatever claims it may have under the same contract as a counterclaim? The Sixth Circuit Court of Appeals interpreted Rule 13 in a straightforward and logical manner and followed accepted precedent in holding that the compulsory counterclaim rule mandates that all contractual claims be brought in a single lawsuit.

In this case, Magna filed a Third-Party Complaint against Triumph in the Pennsylvania litigation asserting a claim for contractual indemnity under Clause 12(A) of the Asset Purchase Agreement. Triumph filed no counterclaim against Magna in connection with the Pennsylvania

lawsuit. Instead, over two (2) years after the Pennsylvania lawsuit resolved favorably to Magna, the Petitioners initiated this lawsuit asserting a claim for contractual indemnity which relies upon the ***same*** contract and the ***same contractual provision*** that formed the basis of Magna's claim against Triumph in the first lawsuit. Logically, the Sixth Circuit concluded that a contract claim that is based upon the same contract and the identical contractual provision that formed the basis of the first lawsuit was a compulsory claim under Rule 13(a). The Petitioners now challenge this assertion by claiming that Triumph's contractual claims should not have been deemed compulsory since it was in the nature of an unmatured claim for indemnity.

While challenging the Sixth Circuit's determination, the Petitioners allege that a Writ of Certiorari should be issued as a conflict exists among the circuits on the issue of whether Triumph's counterclaim should be deemed compulsory. Contrary to the Petitioners' assertion, however, there is no true conflict between the decision of the Sixth Circuit Court of Appeals affirming the judgment in favor of Magna and the decisions from other circuits addressing when and under what circumstances a counterclaim will be deemed to be compulsory. To support their position that a conflict exists among the circuits relating to the interpretation of Rule 13(a), the Petitioners rely solely on the decision of the D.C. Circuit Court of Appeals in *Hall v. General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980). However, when the decision in *Hall* is carefully examined, it becomes clear that this decision is factually distinguishable from the issues which confronted the Sixth Circuit. Moreover, the decision of the Sixth Circuit

was entirely consistent with longstanding precedents which have interpreted the compulsory counterclaim rule to require that all contractual claims be brought in a single action.

Hall involved a products liability action that had been filed against General Motors Corp. ("GM") and one of its dealers. A settlement was reached with the dealership, and the case proceeded to trial against GM. After the jury returned a multi-million dollar verdict, the issue on appeal focused on whether GM should be entitled to a pro rata or pro-tanto reduction of the verdict based on the co-defendant's settlement. Thus, the issue on appeal to the D.C. Circuit was the amount by which a joint tortfeasor settlement would reduce the liability of the non-settling defendant. It was only in dicta, and in response to GM's argument that the settlement had deprived it of a right to seek contribution, that the D.C. Circuit discussed when a counterclaim becomes compulsory. Since the analysis by the D.C. Circuit of when a claim should be deemed compulsory was not central to the judgment, and did not form the basis of the court's holding, *Hall* cannot be construed to be in conflict with the rationale of the Sixth Circuit.

More fundamentally, the Court's dicta in *Hall* involved a general discussion of whether common-law indemnity and contribution claims which are unmatured constitute compulsory counterclaims. However, the Sixth Circuit in this case was not confronted with a common-law indemnity claim. Rather, this case involved a unique and specific factual circumstance where Magna had asserted a claim for contractual liability against Triumph. Having been sued under the contract, the Sixth Circuit

then applied a simple and straightforward analysis of the "transaction or occurrence" test of Rule 13(a) to find that Triumph's failure to raise any contractual claims it might have against Magna resulted in a waiver. Plainly and simply put, the grant of certiorari is unwarranted since no conflict exists with the D.C. Circuit's opinion in *Hall* as the legal issues confronting the Court in *Hall* were different and the facts were entirely distinguishable.

Rule 13(a) plainly states that a party "shall" state as a counterclaim any claim which the pleader has at the time of serving the pleading that arises out of the "transaction or occurrence" that is the subject matter of the opposing party's claim. In this case, the Sixth Circuit correctly recognized that Triumph's contractual claim that was based on the same contract and the identical contractual provision as Magna's claim in the first lawsuit had to be construed as a compulsory counterclaim. To hold otherwise would only emasculate Rule 13(a) and its waiver doctrine by allowing parties to bring multiple claims under the same contract. Moreover, the Sixth Circuit's decision in this case does not create a conflict among the circuits but only serves to reaffirm the basic principle that claims which are logically related and arise out of the same set of operative facts should be brought in a single lawsuit.

The test for identifying a compulsory counterclaim is well-established. In *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057 (3d Cir. 1978), the Third Circuit Court of Appeals indicated that "the operative question in determining if a claim is a compulsory counterclaim is whether it bears a logical relationship to an opposing party's claim". *Id.* at 1059. The Court went on to state:

> A counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual or legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action.

Id. Similarly, the Ninth Circuit Court of Appeals in *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246 (9th Cir. 1987), explained that "the flexible approach to Rule 13 problems attempts to analyze whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all of the issues be resolved in one lawsuit". *Id.* at 827 F.2d at 1249, *citing Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir. 1978).

As Judge Joiner noted in affirming the judgment in favor of Magna:

> There is no question but that Triumph's indemnity claim arises out of the same transaction as that asserted by Magna in that pleading. Magna's Third-Party Complaint seeks contractual indemnity under Paragraph 12 of the Asset Purchase Agreement, the very same paragraph of the contract relied upon in this case. As noted, the parties' indemnity obligations are complimentary, and it would be impossible to adjudicate Magna's rights without determining

> Triumph's as well. It is equally clear that Triumph possessed its indemnity claim against Magna at the time that Magna filed its Third-Party Complaint. Resolution of Triumph's indemnity claim did not depend on any events that might post-date adjudication of Magna's claim but, rather, depended entirely on a transaction between the parties that had already occurred.

71 F.3d at 562.[3]

Given these facts, the Sixth Circuit followed the well-accepted definition of a compulsory counterclaim established by other federal courts and concluded that a second lawsuit seeking contractual indemnity which relied on the very same paragraph of the contract that formed the basis of the first litigation had to be construed as a compulsory counterclaim. This determination was legally correct, in accord with other federal decisions, and no need exists to grant the Petitioners' request for certiorari.

It is unquestionably true that the compulsory counterclaim rule serves a vital public policy goal of preventing fragmentation of litigation and multiplicity of suits. *U.S. General, Inc. v. City of Juliette*, 598 F.2d 1050 (7th Cir.

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[3] It is this distinction between the ripe contractual claim which Triumph possessed and failed to assert, as opposed to an unmatured common-law indemnity claim which these Petitioners fail to recognize. In arguing that Triumph's claim was unmatured and did not have to be brought as a counterclaim, the Petitioners simply cannot rely upon case law suggesting that a common-law indemnity claim should not be classified as a compulsory counterclaim since such an argument fails to recognize the fundamental distinction between a common-law claim and the contractual rights which Triumph now seeks to assert.

1979). In that regard, it has been recognized on a number of occasions that the purpose of the compulsory counterclaim rule is to prevent multiplicity of litigation while achieving resolution in a single lawsuit of all disputes arising out of common matters. *Warshawsky & Co. v. Arcata National Corp.*, 552 F.2d 1257 (7th Cir. 1977); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982). Because of the important policy goals fostered by the compulsory counterclaim rule, it has also been recognized that this rule is to be given a broad interpretation aimed at avoiding piece-meal litigation. *Sue & Sam Mfg. Co. v. B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976). The Sixth Circuit recognized these policy goals and applied Rule 13 to preclude the relitigation of the claim that properly belonged as part of the Pennsylvania litigation. This decision should not be disturbed on appeal.

CONCLUSION

For the foregoing reasons, the Respondents contend that the decision of the United States Court of Appeals for the Sixth Circuit involved a proper application of Rule 13 of the Federal Rules of Civil Procedure and was not in conflict with any of the decisions from other circuits. The Respondents, therefore, respectfully request that this action be concluded and that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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